PROMOTING THE RULE OF LAW IN THE INTERSECTION OF BUSINESS, HUMAN RIGHTS, AND SUSTAINABILITY

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ABSTRACT

The relationship between business and society has expanded to incorporate both profitable, social, environmental, governance, and human rights concerns. Meeting the bottom line requires that companies behave responsibly and are well versed with the importance of integrating international hard and soft law standards as part of their policies and field operations. Lawyers advising different industries and sectors need to incorporate a comprehensive approach in order to also be able to address social, environmental, governance, and human rights concerns beyond traditional corporate law matters.

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I. INTRODUCTION

The relationship between business and society has been the subject of critical examination since the 1990s in light of negative impacts corporations have had on the environment and on human rights of individuals and communities, particularly in rule of law-challenged societies and jurisdictions. By means of anti-corporate campaigns and awareness-raising activities, consumers and citizens demanded the integration of social and environmental concerns of the societies where they operate into profitability worksheets. These stakeholder demands influenced investors, shareholders, and management, both in corporate headquarters and at the operational level. In practice, companies were asked to measure three distinct bottom lines: profit, people, and the planet. These three bottom lines, largely promulgated by John Elkington, drove companies to look at their impact in these three areas and to incorporate them as indicators of their financial performance and cost of doing business. Only when corporations measured their social and environmental impact, and were able to systematically demonstrate the numbers, would they become socially and environmentally responsible organizations.

II. MEETING THE “TRIPLE BOTTOM LINE” THROUGH A MULTI-SECTOR EFFORT

Meeting and accounting for the “triple bottom line” of achieving profits while respecting social and environmental concerns was translated into the new norm for many corporations as a way of responding to society’s demands. In turn, the corporate social responsibility (CSR) field and practice also embedded this comprehensive way of reporting

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and engaging with different stakeholders. The late 1990s also saw the United Nations engaging the private sector and different industries together with governments and civil society organizations around a common framework that aligns corporate practices with ten universally accepted principles of international law in the areas of human rights, labor, environment, and anti-corruption through the establishment of the U.N. Global Compact.

Fast forwarding to the twenty-first century, we find a challenging, unevenly interconnected, and complex globalized world scenario where business and society meet and attempt to interact in the midst of a playing field that is not leveled. Extreme social and economic inequalities persist between these two players, along with challenges to governance, rule of law, and development. Conflict concerns of different jurisdictions and societies further amplify these tensions. At the same time, we are experiencing many growth opportunities through the “falling trade barriers, instant communications, relatively fast and inexpensive transportation, and rapidly changing technologies that are shaping the world’s economy.”

To add another layer of complexity, in some jurisdictions that welcome foreign direct investment and have active participation of the private sector in economic development, the rule of law and essential public services are “notable by [their] absence” while serious challenges to the peace, stability and security persist. Furthermore, it has been widely recognized that as a result of these dynamics, many urgent social concerns, including limited respect for human rights, climate change, inadequate foot supply, and escalating food prices, cannot be

4. The evolution of the definition of CSR has evolved over the years. However, central to its core is the fact that corporations can achieve the bottom line by aligning their goals and business strategy to the environmental, social and governance concerns of the societies and communities they benefit from and work with.

5. The Ten Principles, UNITED NATIONS GLOBAL COMPACT, https://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html (last visited Jun. 10, 2015). These universally accepted principles were derived from the Universal Declaration of Human Rights, the International Labour Organization on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development, and the U.N. Convention Against Corruption. Id.


solved by any one sector alone. Rather, many global actors agree that, “cross-sector international collaboration, creativity, and courage will be required to address these major global problems.”

III. THE RULE OF LAW FIELD AT THE INTERSECTION OF BUSINESS AND HUMAN RIGHTS

Today, the rule of law field is by no means the domain only of civilian agencies and international organizations and actors. In fact, a myriad of actors in the field come from the private and public sectors, including private and international law domains. All of them are stakeholders in the discourse and practice of promoting the rule of law. The private sector is involved in the form of corporations, investors, shareholders, business, and industry associations. These private entities show concern for promoting developing the rule of law and promoting the public interest not only out of a desire to become good corporate citizens, but also because they require “transparency, predictability, stability, accountability and due process” if they are to both generate profits and maintain successful operations. Several industries and businesses are also acting on demands beyond those of their shareholders, including the interests of various sectors of society (including indigenous and other local communities) so as to uphold the rule of law and promote peaceful development while also protecting human rights, labor rights and standards, safety, and environmental standards as they carry out their operations.

This context led several industries and some multinational corporations (MNCs) to launch international public policy initiatives and help develop international standards with which they can ensure self-compliance, regardless of the rule of law conditions and governance of their countries of operation. Such companies are thereby “becoming

8. Potter & Sine, supra note 6, at 182.
10. Id.
a stakeholder committed to fostering and upholding the rule of law,” while holding themselves accountable to the highest industry standards. However, in today’s complex world scenario and in light of the negative externalities of several industries operations’ taking place at home and abroad, societies seem to expect more than CSR strategies that meet the triple bottom line, the upholding of (self-regulatory) international standards, or even streamlining social, environmental, governance and human rights performance reporting in operations across jurisdictions.

Today’s complex world scenario is coupled with complex questions and reactions that have a direct impact on a company’s liability. As the Kiobel case shows, communities are beginning to seek jurisdictional redress and monetary compensation at different international forums for environmental damages and loss of livelihood, violations to human rights of the individuals and communities where companies operate. These actions are beginning to re-shape the relationship between business and society and demanding a new type of corporate responsibility. Outside or alongside seeking jurisdictional redress, communities and even some governments are taking a stand against the negative social and environmental externalities of corporate activity across jurisdictions. One means by which they are taking such a stand is through the definition and withholding of a “social license.”

IV. Social License: Case Studies from Argentina and the United States

This section examines the concept of “social license” in light of two cases that occurred in Argentina and the United States. It will start by sharing pertinent definitions and then lead to the jurisdictional cases and their outcomes. Finally, the implications of cases like these for business and human rights will be discussed.

A. Defining a “Social License”

A social license can be defined as “bans and moratoria . . . denials of public consent to operate arising from concerns about environmental and social risks. Strategies impose a wide range of costs on companies, ranging from loss of reputation, profitability, jobs, access to valuable...
resources, and timely production and delivery of goods and services.”

In practice, the development of a social license occurs outside formal permitting or regulatory processes of different industries and is a process heavily reliant on trust-based relationships between the company and the community, as opposed to legal and regulatory transactional work. Trust-based relationships emphasize the importance of building rapport with communities of operation, understanding stakeholders concerns, interests and positions as opposed to merely responding to the expectations of shareholders, directors, and institutional investors. Transactional work will be most successful and generate sustainable and profitable results as long as it also incorporates the perspectives of the local communities in which investors operate or expect to operate.

If corporations, including management, investors, and shareholders, whether operating at home and abroad, are not attuned with consumers’ and communities’ informed and valid expectations, they risk confronting a scenario where they are in full compliance with any given jurisdiction’s legal and regulatory standards with no public consent to operate. This could possibly deem the entire investment unprofitable, unsustainable, and unsecured. In other words, “strict compliance with prevailing laws is not sufficient to gain approval for projects and . . . when a project is blocked, political considerations fueled by social expectations and pressures, ultimately can tip the balance against the company.”

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B. The Towns of Dryden and Middlefield and the Municipality of Allen: The Importance of a Social License

Case law from Argentina and the United States provide good illustrations of how communities can deny a social license to operate in the context of unconventional oil and gas development through fracking.\(^\text{20}\) By using the jurisdictional venues, these communities have sought jurisdictional redress to confirm a ban or restriction on fracking activities through the issuing of local zoning laws, which was the case in the Towns of Dryden\(^\text{21}\) and Middlefield case in New York State. The Municipality of Allen\(^\text{22}\) case in the Province of Rio Negro in Argentina shows a local municipality also using the jurisdictional venue to seek a ban on extraction of natural resources, although it was not ultimately successful with its claim.

In 2013, the Municipality of Allen in the province of Rio Negro in Argentina sought to ban unconventional oil and gas development or “fracking” activities in its territory. However, the court rejected the claim based on the fact that the regulatory authority over hydrocarbons rests in the Provinces’ level, according to the National Constitution. Furthermore, the court ruled that the municipality of Allen ended up exceeding its local policing authority to exercise legislative power over the Provincial government’s authority.\(^\text{23}\)

By contrast, the towns of Dryden and Middlefield in New York State ended up succeeding with their claim when the New York Court of Appeals affirmed a lower court ruling in 2014 and found that the towns had the authority to ban “fracking” through zoning laws that foster “the health, safety, morals, or the general welfare of the community and that are directed at regulating land use generally and do not attempt to govern the details, procedures or operations of the oil and gas industries.”\(^\text{24}\)

In the case of the municipality of Allen, the Supreme Court of Justice of the Province of Rio Negro’s rejection of the ban request opened up a


\(^{23}\) See Terry, supra note 18; Mooney, supra note 20, at 37.

\(^{24}\) Town of Dryden, 16 N.E.3d at 1194.
public opinion outcry and even mobilizations to the streets. Over two hundred citizens from the Allen community mobilized against the State Supreme Court decision because communities felt it did not protect the public health, livelihoods and the environment. The Dryden and Middlefield case in particular set the stage to back the decision of 170 New York municipalities that have passed measures to protect residents from the impact of fracking activities due to the organized advocacy and influence of organized citizens that started in Dryden and resonated with a bi-partisan board.

For many industries and companies, this reality is here to stay. Corporate responsibility demands high levels of accountability to transactional, legal, and regulatory standards. It also calls for the development of corporate strategies of engagement that go beyond CSR programming. These strategies call for the creation of shared value (CSV) at the center of a company’s profitability and competitive position, by leveraging resources and expertise of the company to generate economic value, and by creating social value beyond operational and unsustainable CSR strategies.

As seen in both cases above, societies and communities are taking a stand against some corporations’ negative impacts and externalities on their livelihoods, the environment, and human rights. They themselves are generating demand-driven interventions while raising their own rule of law concerns and demands, even in developed jurisdictions. Therefore, from a rule of law promotion effort’s perspective where the private sector alone or even international organizations and advisors are working on the governance structure around these issues, there is a call for a different type of approach to business’ understanding and addressing societies’ questions and concerns. For the rule of law community of practitioners, this means considering multi-sector and innovative approaches to rule of law development that move away from devising processes aimed at institution building and focus more on efforts that represent the demand for better services from the consumers of these services. This new approach makes it imperative to listen to the end user’s perspectives and to seek out opportunities for

28. Mooney, supra note 9, at 5.
bottom-up measures that will generate local capacity development and ownership, thus creating the foundations for sustained change.”

V. BUSINESS, HUMAN RIGHTS, AND SUSTAINABILITY

The relationship between business, human rights, and sustainability has gained momentum in recent years with the private sector, governments, civil society, and international organizations, owing largely to the passage of the U.N. Guiding Principles on Business and Human Rights (UNGP) in 2011 and the 2012 U.N. Rio+20 Sustainable Development Conference. The debate about the role of business in addressing human rights is following the same pattern as the environmental debate. Over twenty years ago, the rationale for environmental action was mainly driven by risk, the understanding of environmental opportunities was limited, and most boardrooms had rarely heard of environmental issues before. Today, companies, industries, and sectors are moving from denial of corporate responsibility for human rights to voluntary acknowledgment. For example, these actors have signed the U.N. Global Compact commitment to human rights principles and adopted codes of conduct, supplier standards, and social and sustainability compliance activities.

A. The Role of the UN Guiding Principles

The “Protect Respect and Remedy” framework of 2008 and the UNGP, which were finally endorsed by the UN Human Rights Council in 2011, have re-shaped the discussion around business and human rights by grounding it in joint responsibilities of states and the private sector: the responsibility of the State to protect human rights and of the private sector to respect human rights, all within a framework of shared responsibility of both actors to facilitate access and put in place remedy mechanisms to effectively address human rights grievances.

The notion of shared responsibility recognizes that the challenges arising from globalization are structural in character, involving governance gaps and governance failures. Accordingly, they cannot be resolved by an individual liability model of responsibility alone but also

29. Id. at 6.
30. Potter & Sine, supra note 6, at 183.
need to be dealt with in their own right. This requires a model of strategically coherent distributed action focused on realigning the relationships among actors, including States, corporations and civil society.33

The UNGP “shared responsibility” framework was the result of a highly engaging and consultative process that involved a wide variety of audiences and stakeholders that has become a reference point for the debate and field of corporate responsibility.34 While the UNGP does not provide a State-centric, treaty-driven model that addresses corporate accountability for human rights abuses, it does provide concrete guidance regarding the obligations of States and responsibilities of businesses to provide effective remedies for those human rights abuses.

B. Furthering Dialogue: the 2012 UN Conference on Sustainable Development

The 2012 U.N. Conference on Sustainable Development35 (also called Rio+20 as it marked the twenty years since the U.N. Conference on Environment and Development) brought together member nations, U.N. officials and international organizations, private sector and industry representatives, and civil society organizations to address the most pressing issues global environmental and development challenges confronting the world today.

Through its action plan document—entitled “The Future We Want”—Rio+20 set the stage for the development of green economy policies, agreed to establish a process for Sustainable Development Goals (SDG) linked to the Post-2015 Development Agenda expected to be released by September 2015, and witnessed the emergence of several voluntary multi-stakeholder commitments and partnerships for sustainable development which included the private sector.


34. The debate between corporate accountability vs. corporate responsibility has been recently raised by the Government of Ecuador who proposed a legally binding treaty instrument on business and human rights to clarify the obligations of transnational corporations in the field of human rights and provide for the establishment of effective remedies in cases where domestic jurisdiction is clearly unable to provide them. This action was ratified in Geneva at the December 2014 Forum on Business and Human Rights and the U.N. Human Rights Council adopted the resolution in June 2014. See Human Rights Council Res. 26/L.22, U.N. Doc. A/HRC/26/L.22/ Rev.1 (Jun. 25, 2014).

C. The Private Sector’s Response: Human Rights Risk Assessment

In the midst of the aforementioned framework and discussion, many industries and corporations are now looking at how to adopt human rights policies and how to embed them as part of their sustainability strategies. Companies are integrating these policies within detailed human rights due diligence and risk assessment frameworks and are establishing access to remedy mechanisms to address different types of community grievances. While this is still a work in progress, two relatively recent surveys of top business executives, the 2013 BSR/GlobalScan report and the Conference Board 2013 Sustainability Practices Survey, demonstrate an interesting trend within the corporate sector across regions.

In the 2013 BSR/GlobalScan report, 700 top executives of almost 500 companies reported that human rights continues to be the top rated priority for organizations in terms of their current and projected sustainability efforts. The Conference Board 2013 Sustainability Practices Survey conducted in partnership with Bloomberg and the Global Reporting Initiative (GRI) shows that almost half of S&P Global 1200 companies reported having a human rights policy, compared to only 22% of S&P 500 companies. Furthermore, the geographic analysis shows that European companies are more likely to report having a human rights policy (63%), followed by Latin America companies (57%), Asia Pacific companies (51%) and the lowest ranking going to the North American companies (23%).

The investment sector in particular is extremely relevant for this discussion because it can advance the human rights and sustainability agenda in corporations through its leverage and influence as shareholders and members of the institutional investment sector (pension funds,

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40. Id.
investment managers, insurance companies).\textsuperscript{41} While the sector has been very active in addressing environmental, social, and governance concerns (ESG) through the implementation of different standards and initiatives over the past decade,\textsuperscript{42} the UNGP offer investors a very strategic opportunity to “engage with [e]nvironmental, [s]ocial, and [g]overnance (ESG) initiatives about human rights in an informed manner” by using the “due diligence and risk assessment framework to assess human rights-related risks across their portfolios” and take an informed action with companies that would also tackle the adoption of proper grievance mechanisms.\textsuperscript{43}

VI. A GROWING SYSTEM OF INTERNATIONAL LAW: THE STANDARD SETTING ROLE OF SOFT LAW

Through a combination of both soft and hard law approaches, the UNGP provides guidance on the shared responsibility framework of the State and the corporate responsibility of the private sector. For the latter in particular, the UNGP introduced the principle of “human rights due diligence”:

[The principle is an] ongoing process . . . whereby companies become aware of, prevent, and mitigate adverse human rights impacts. [The due diligence principle is comprised of four key elements as noted in the UNGP guidance]: having a human rights policy, assessing human rights impacts of company activities, integrating those values and findings into corporate cultures and management systems, and tracking as well as reporting performance.\textsuperscript{44}

A. The Advantage of Soft Law: Fomenting Dialogue Between Multiple Actors

The UNGP’s due diligence principle and guidance have been aligned


to several standards developed by other international organizations. All together these standards form a growing and inter-connected body of soft and hard international human rights law. While the UNGP is not a binding treaty per se, its passage has influenced how many corporations are approaching human rights as part of their policy and operations and has also reminded states of their paramount responsibility to protect human rights. The UNGP is also influencing the development of national policies that adopt these international standards as part of national action plans, issuing CSR guidance for specific industry and sectors based on the UNGP and other international standards and multi-stakeholder platforms such as the Voluntary Principles on Security and Human Rights. 45 Furthermore, countries have already taken a stand on passing hard law measures that address different areas of the business, human rights, sustainability and corporate social responsibility as part of their multi-stakeholder national action plan processes, as can be seen in the United Kingdom, Canada, the United States, or even through state-led regulatory initiatives like those in China.46 Lastly, companies from different industries have begun integrating human rights policies citing the UNGPs and other International Human Rights standards to support their field operations.

An entirely new system is emerging that combines both international soft and hard law, with soft law standards being increasingly embedded as part of due diligence mechanisms and sustainability operations in the private sector. At the international level, there have been important standard-setting efforts through which states have crystallized their expectations regarding responsible business behavior. An entire battery of soft law currently exists that has been influenced by the leadership of major international organizations since the 1970’s and most recently, UNGP’s due diligence recommendations. 47

In fact, according to the UN Secretary-General’s Special Representative on Business and Human Rights, John Ruggie:

[T]he standard-setting role of soft law remains as important as ever to crystallize emerging norms in the international community. The increased focus on accountability in some intergovernmental arrangements, coupled with the innovations in soft law

mechanisms that involve corporations directly in regulatory rulemaking and implementation, suggests increased state and corporate acknowledgement of evolving social expectations and a recognition of the need to exercise shared responsibility.\textsuperscript{48}

The UNGPs have been criticized because of their voluntary or soft-law nature and because they do not advocate for a State-centric treaty driven on corporate accountability for human rights violations. At the same time, however, they have been able to bring to the table the dynamics between hard and soft law while addressing the governance and rule of law challenges confronted by several regions and jurisdictions that welcome foreign direct investment.

In reality, one of the most direct outcomes of the UNGPs has been to incorporate civil society’s expectations into a larger debate and to mobilize a wide variety of stakeholders within formal international institutions, including ones focused on international human rights law, governance, and rule of law promotion efforts abroad. These institutions are not only looking to support State-centric or supply driven interventions; they are also willing to support civil society’s interests.

B. The Role Of The Legal Profession In The Interdisciplinary Challenge Of Business And Human Rights

This emerging international soft law system of business and human rights is also influencing a new field of practice beyond human rights law that is much more dynamic, interactive and complex. This new field of practice of business and human rights is also influencing and integrating the practice of law and forcing lawyers to think beyond their silo areas. For instance, in a Mergers and Acquisitions transaction, lawyers are most likely to encounter questions dealing with social, environmental, human rights and environmental concerns. These questions and challenges will emerge regardless of whether they have a domestic or international practice. This new field of practice also involves international law, criminal law, company law, government law, securities law, investment law, international business transactions and mergers and acquisitions, alternative dispute resolution, governance, transparency, and the law of contracts—just to name a few areas.\textsuperscript{49}


\textsuperscript{49} The U.N. \textit{Guiding Principles on Business and Human Rights}, supra note 13.
The complexity of the legal questions emerging from this new field of practice requires both human rights and corporate lawyers—including those in-house—advising industries and working in communities where there is a potential to collide with human rights and ESG standards. Lawyers of companies in such communities that risk running into serious conflicts, economic loss, or reputational damage, are well versed in business and human rights standards and the emerging system of law. They will increasingly be required to integrate ESG and human rights legal standards as part of their advisory services to their clients.

VII. Conclusion

It is clear that changes in the relationship between business and society have dramatically shifted over the past twenty to thirty years, moving from strategies that fostered philanthropic activity by the business sector to more responses aligning business strategies with societies’ environmental, social, governance and human rights expectations. The UNGP’s contribution to this debate has marked the need for multi-sector approaches where governments, the private sector and civil society organizations can foster dialogue platforms that align and streamline practices leading towards the development of ESG and human rights policies and their implementation on the ground.

In light of these developments in business and human rights, during the past few years in particular, the organized legal profession at home and abroad has taken a leadership role in exploring all these different questions while examining the role of the legal profession in the areas of business, human rights and sustainability. The legal profession has taken this lead by endorsing international standards, organizing advisory working groups, and producing guidelines on how to implement these principles and address issues related to the professional responsibility of lawyers and codes of conduct.50

The due diligence principle, both in the ESG and human rights sectors, will continue to take a leading role as all stakeholders involved in business and human rights move towards identifying good practices that they can learn from. At the same time, the UNGP pillar of Access to

Remedy will also become more relevant as companies are looking for innovative ways not only to address community grievances, but also to make sure there are proper mechanisms (both jurisdictional and non-jurisdictional) for responding to societies’ concerns regarding alleged violations to ESG and human rights during companies’ field operations. These legal issues—along with many more—demonstrate how the rule of law will continue to intersect with the integration of business, human rights and sustainability.